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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/696,780	10/28/2003	Dinan S. Gunawardena	MS1-1635US	7941

22971 7590 03/05/2009

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EXAMINER	
LUU, LE HIEN	
ART UNIT	PAPER NUMBER
2441	

NOTIFICATION DATE	DELIVERY MODE
03/05/2009	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No.	Applicant(s)	
	10/696,780	GUNAWARDENA ET AL.	
	Examiner	Art Unit	
	Le Luu	2441	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *10/28/03 - 04/02/04*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-64* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-4,7-19,22-33 and 36-64* is/are rejected.

7)☐ Claim(s) *5,6,20,21,34 and 35* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *10/28/03* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *04/02/04*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

1. Claims 1-64 are presented for examination.

2. The title of the invention is not descriptive. A new title is required that is clearly indicative of the invention to which the claims are directed.

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless --
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.
>
> or
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.
>
> or
>
> (e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000.

Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

4. Claims 1-4, 7-15, 16-19, 22-30, 31-33, and 36-64 are rejected under 35 U.S.C. § 102(a) and 102(e) as being anticipated by Klassen et al. (Klassen), Pub. No. 2002/0080726.

5. As to claim 1, Klassen teaches the invention as claimed, including a method comprising:

computing a first probe estimate from a first probe sequence transmitted over a network from a first device to a second device (page 3, paragraph [0044]);

computing a second probe estimate from a second probe sequence transmitted over the network from the first device to the second device, the first probe sequence providing a different load to the network than the second probe sequence (pages 3-4, paragraphs [0050, 0076]); and

estimating a sustainable capacity of the network based on the first probe estimate and the second probe estimate (page 3, paragraphs [0047 - 0049]; pages 6-7, paragraphs [0101 – 0139]).

6. As to claims 2 and 12-15, Klassen teaches sustainable capacity is further based on a minimum delay time of individual round-trip delay times associated with the first probe sequence and the second probe sequence; each probe estimate is an average round-trip delay time, a median round-trip delay time, a range of round-trip delay times,

a standard deviation of round-trip delay times. (page 4, paragraphs [0065 – 0071]; page 7, paragraph [0131]).

7. As to claim 3, Klassen teaches the sustainable capacity of the network relates to data traffic flowing from the first device to the second device, and further comprising: computing a third probe estimate from a third probe sequence transmitted over the network from the second device to the first device; computing a fourth probe estimate from a fourth probe sequence transmitted over the network from the second device to the first device, the third probe sequence providing a different load to the network than the fourth probe sequence; and estimating a reverse sustainable capacity of the network for data traffic from the second device and the first device based on the third probe estimate and the fourth probe estimate (page 3, paragraphs [0044 - 0062]; pages 6-7, paragraphs [0101 – 0139]).

8. As to claim 4, Klassen teaches the first probe sequence includes probe packets periodically transmitted from the first device to the second device (page 3, paragraph [0051]).

9. As to claim 7-9, Klassen teaches neither the first probe sequence nor the second probe sequence saturate the network; the second probe sequence loads the network more than the first probe sequence; generating a first probe sequence, wherein each probe packet in the first probe sequence has a unique signature (page 3, paragraphs

[0047 - 0049]; pages 6-7, paragraphs [0101 – 0139]).

10. As to claim 10-11, Klassen teaches timestamping each packet in the first probe sequence prior to transmission to the second network device; timestamping each response to each probe packet in the first probe sequence after to reception of the probe packet from the second network device (pages 3-5, paragraphs [0059, 0076, 0083]).

11. Claims 16-19, 22-30, 31-33, and 36-64 have similar limitations as claims 1-4 and 7-15; therefore, they are rejected under the same rationale.

12. The following is a quotation of 35 U.S.C. 101 reads as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

13. Claims 16-30, 46-50, and 56-64 are rejected under 35 U.S.C. 101 as not falling within one of the four statutory categories of invention because the claimed invention is directed to non-statutory subject matter. The language of the claimed invention raises a question as to whether the subject matter is new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement. The claims recite components in a system, series of steps in a method, and executions to be performed by computer program. For the claims to be statutory subject matter under 35 U.S.C. 101, they must (1) be tied to particular machine, or (2) transform underlying subject matter to a different state or thing. Please refer to In Re Bilski 88 USPQ2d

1385. The instant claims 16-30, 46-50, and 56-64 are neither positively tied to a particular machine that accomplishes the claimed nor transform underlying subject matter, and therefore they do not qualify as a statutory subject matter.

14. Claims 5-6, 20-21, and 34-35 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims, and claiming hardware components that carry out functions in the system, steps in the method, and executions in the computer program to overcome the rejection under 35 U.S.C. 101.

15. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Le Luu whose telephone number is 571-272-3884. The examiner can normally be reached on 8:00am - 4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rupal Dharia can be reached on 571-272-3880. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic

Business Center (EBC) at 866-217-9197 (toll-free).

/Le Luu/

Primary Examiner, Art Unit 2441